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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~963~~ 107

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. 963

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioners, plaintiffs below, seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered March 2, 1960, affirming a judgment of the United States District Court for the Southern District of New York.

The opinion of the District Court (Honorable Richard H. Levet) granting summary judgment dismissing the complaint is reported in 173 F. Supp. 114. The opinion of the Court of Appeals affirming the

judgment of the District Court is reported in 276 F. 2d 280, and is also printed in the appendix to the petition (Pet. 15-25).

The action was brought to recover damages for the alleged wrongful death of Jasper Wallace Hall, plaintiffs' decedent, who died in an airplane accident in the vicinity of Alvarado, California, on March 20, 1953. The flight was for the purpose of transporting military personnel from New Mexico to California on a plane operated by the defendant under contract to the United States Government. The decedent's wife and child were residents of the State of South Carolina at the time of his death. Plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as guardian *ad litem* of her minor child. Jurisdiction was predicated upon diversity of citizenship. Defendant moved for summary judgment upon the ground that the action was barred by the California Statute of Limitations. The District Court granted the motion in an order and judgment which were unanimously affirmed on appeal.

ARGUMENT

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. No conflict of decisions and no important question of federal law is involved.

2. No constitutional question is involved in the application of Section 13 of the New York Civil Practice Act.

POINT I

No conflict of decisions and no important question of federal law is involved.

Since the alleged wrongful act causing decedent's death occurred in the State of California any substantive right of action which plaintiffs may have is governed by the law of that state. *Baldwin* v. *Powell*, (1945) 294 N. Y. 130.

On page 3 of the petition, under the heading "The Pertinent Facts", petitioners set forth as undisputed facts: the marriage on December 26, 1951; the death of decedent on March 20, 1953; that the widow reached the age of 18 on November 17, 1954; that the action was not commenced until November 7, 1958; that the widow was and is a resident of South Carolina; and that the defendant was and is a California corporation.

At pages 5 and 6 of the petition petitioners have quoted from the various California statutes relevant to this case. However, in quoting from the first sentence of Section 25 of the California Civil Code which specifies that a married woman reaches her majority at the age of 18 years, petitioners have omitted two important clauses. Therefore, respondent takes the liberty of setting forth the full sentence of that section of the Code as it read on March 20, 1953, as follows:

> "§ 25. Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on mar-

riage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age. * * * "

Leading California cases have held that the phrase "transaction respecting property" in Section 25 includes the bringing of an action for wrongful death, and that an action by a married woman under the age of twenty-one years for wrongful death is barred if brought more than one year after the wife has reached her eighteenth birthday.

In *Haro v. The Southern Pacific Railroad Company*, (1936) 17 C. A. 2d 594, 62 P. 2d 441, the widow was over the age of eighteen years at the time of the death of her husband and under twenty-one years of age when the action was instituted. The court referred to Section 25 of the Civil Code and after citing several cases construing the words "transaction" and "property," concluded (p. 597):

"It would seem, therefore, that the phrase 'transaction respecting property' includes within its definition the bringing of an action by a widow for the wrongful death of her husband. That

being true, Mrs. Haro was under no disability that would prevent her from suing for the damages suffered from the wrongful death of her husband at any time during the year following his demise. As she did not so sue her action is barred by the statute of limitations. (Subd. 3, sec. 340, Code Civ. Proc.) As her cause of action is barred, the causes of action of the other plaintiffs are also barred. (*Sears* v. *Majors*, *supra*)"

It is clear from the *Haro* case that a married female who has reached the age of eighteen years is considered to have reached her majority and is deemed an adult person for the purpose of instituting an action for wrongful death.

Another case squarely in point is the case of *Caraway* v. *Burns*, (1956) 143 Cal. App. 2d 327, 299 P. 2d 689. That action involved a suit for personal injuries arising out of an accident occurring on July 18, 1948. Plaintiff was married on February 10, 1951, after having reached the age of eighteen years. Her twenty-first birthday was on May 1, 1953, and the complaint was filed on April 30, 1954. The California Superior Court had granted summary judgment for the defendants on the ground that the action was barred by the California statute of limitations (Code Civ. Proc., Sec. 340, subd. 3) because plaintiff had reached her majority on February 10, 1951. On appeal, in affirming the judgment of the lower court, the California Court of Appeals said (pp. 328-329):

"The point was decided against plaintiff's contention in *Haro* v. *Southern Pac. Co.* (1936), 17 Cal. App. 2d 594 [62 P. 2d 441], a wrongful

death action by a widow, 19 years old when her husband died, instituted more than one year after his death but before she reached the age of 21. The court held that the phrase 'transaction respecting property' in Civil Code section 25 includes the bringing of an action for wrongful death, that she therefore was under no disability preventing her to bring the action at any time during the year following his death and that at the end of that year the action was barred by the statute (p. 597). The Supreme Court denied a hearing. Appellant's attacks on this decision and her contention that it has lost authority because of an amendment made in 1953 in section 25, *supra*, are without merit."

From the foregoing it is clear that the instant action was barred on November 17, 1955, one year after Marjory M. Hall reached her eighteenth birthday.

It is also the law of California that where a cause of action is barred as to an adult parent, it is also barred as to the minor infant. *Sears* v. *Majors*, (1930) 104 Cal. App. 60, 285 P. 321.

The *Sears* case involved an action for wrongful death arising out of the malpractice of a defendant physician. The infant son was fifteen years of age at the time of his father's death and nineteen years of age when the action was commenced four years after the death. Both parties agreed that at the time that the action was commenced, the mother was barred by the statute of limitations. Plaintiffs argued that the infant's action was not barred by reason of the tolling of the statute of limitations by virtue of Section 352,

subd. 1, of the Code of Civil Procedure on the ground of infancy, and then urged that if the cause of action was saved as to the infant it was also saved as to the mother. The court rejected this argument, stating at page 62:

> "In reply, the defendants assert that a single joint cause of action is given to the heirs by Section 377 of the Code of Civil Procedure, and that the language of the statute permits of no other construction. (Civ. Code, sec. 1431; Salmon v. Rathjens, 152 Cal. 290, 294 [92 Pac. 733].) Continuing, they claim that the action being barred as to all excepting the infant, that it was also barred as to him. We think the contention is well founded. True, the court has never decided the point with reference to the Code of Civil Procedure, section 377; but the decisions are so closely in point as to be determinative. * * *"

The contention, at pages 10 and 11 of the petition, that the *Sears* and *Haro* cases, *supra*, no longer would be followed in California is totally without merit. In support of their argument petitioners cite three cases, to wit: *Perkins* v. *Robertson*, 140 C. A. 2d 536, 295 P. 2d 972 (1956); *Flores* v. *Brown*, 248 P. 2d 922 (1952); and *Secrest* v. *Pacific Electric Ry. Co.*, 141 P. 2d 747 (1943). In none of the three cases so cited by petitioners was the statute of limitations involved.

The *Perkins* case was an action brought by minor children against their stepfather to recover for the wrongful death of their mother and for injuries to the minor children sustained in an automobile accident. The Supreme Court sustained a demurrer to the amended complaint and the infant plaintiffs ap-

pealed from the judgment in favor of their stepfather. The California District Court of Appeal reversed the judgment, holding in substance that the infant plaintiffs had a right to sue their stepfather. However, it sustained the demurrer as to one of the heirs who was guilty of contributory negligence causing the accident. The court said (p. 977):

> "If one of the heirs bringing suit for wrongful death was himself guilty of contributory negligence no recovery by him is permitted, but the remaining heirs may nevertheless recover their own damages in the action. (Citing *Bowler* v. *Roos*, 213 Cal. 484, 485, 2 P. 2d 817)."

The *Perkins* case not only did not attempt to change the rule laid down in the *Sears* and *Haro* cases, *supra*, but it affirmatively concurred that the cause of action created by Section 377 of the California Code of Civil Procedure "is a joint one, a single one and an indivisible one." (p. 976.)

Flores v. *Brown*, 248 P. 2d 922, *supra*, cited by petitioners involved an automobile collision in which three people were killed and two were injured. The dead consisted of the driver, his infant son and a friend of the family. The injured were the wife of the driver and one of their children. In five actions instituted against the owner of the truck which collided with the passenger vehicle, the defendants denied negligence and pleaded contributory negligence. The trial court instructed the jury that the contributory negligence of the husband would bar recovery for his death and could also be imputed as contributory negligence of his wife to bar recovery for her injuries. The jury brought in a verdict for the defendants in the action

for the wrongful death of the husband and for the plaintiffs in various amounts in the other four actions. The trial court thereafter granted a motion for a completely new trial as to all actions, all parties, and all issues. On appeal the Supreme Court of California, *en Banc*, affirmed in part and reversed in part. There is nothing in the court's decision that is even remotely relevant to any question presented by the present petition.

Similarly, in *Secrest* v. *Pacific Electric Ry. Co.*, 141 P. 2d 747, *supra*, a wife sued the defendant for the wrongful death of her husband as a result of injuries suffered in a collision between an automobile driven by the wife in which her husband was a passenger and a bus operated by the defendant. The lower court ruled that plaintiff was estopped from prosecuting the action by an adverse judgment entered in an earlier action by plaintiff and decedent for personal injuries arising out of the same collision. The District Court of Appeal affirmed the judgment. The decision of the Appellate Court did not touch upon any question passed upon in the *Sears* and *Haro* cases nor upon any question now before this Court upon the present petition.

Petitioners argue (Pet. 9) that Rule 17(b) of the Federal Rules of Civil Procedure should be determinative of when the widow reached the age of majority. However, since this is a diversity case state law rather than federal law should be controlling. In view of this Court's decision in *Guaranty Trust Co.* v. *York*, (1945) 326 U. S. 99, it seems clear that Rule 17(b) can have no application to the issues involved in this lawsuit. In the *Guaranty Trust Co.* case, Mr.

Justice Franfurter, in delivering the majority opinion of this Court said (pp. 108, 109):

> "Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

And further at page 110:

> "* * * As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. See Morgan, Choice of Law Governing Proof (1944) 58 Harv. L. Rev. 153, 155-158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there. Such particular rules of local law, however, do not in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a

> State court, a federal court ought not to afford recovery."

And further at page 112:

> "* * * The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity."

The voice of California has spoken in the *Stears* and *Haro* cases and the voice of the legislature of New York State has spoken in Section 13 of the New York Civil Practice Act.

POINT II

No constitutional question is involved in the application of Section 13 of the New York Civil Practice Act.

Since this is a diversity action brought by a nonresident of New York upon a cause of action arising in California, the court below recognized (Pet. 20) that it was required, by Section 13 of the New York Civil Practice Act, to apply the one-year limitation of California applicable to actions for wrongful death together with "all its accouterments."

The application of Section 13 of the New York Civil Practice Act by the court below does not involve any question of federal constitutional law. On the contrary, the constitutionality of a substantially similar Minnesota statute was upheld by this Court in *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553 (1920). In that case, this Court stated that the "privileges and immunities" clause of the Constitution, Article IV, § 2, is satisfied "if the non-resident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." 252 U. S. 553, 562. Here, the widow could have enforced any rights she and her child may have had under California statutes in the courts of New York at any time following her husband's death and prior to her nineteenth birthday by a guardian *ad litem*, New York Civil Practice Act, Sections 201-206. Thus, for a period of more than two and one-half years from the time her cause of action accrued, the widow was given all of the rights she would have had as a resident of New York, including the right of access to the New York courts by a guardian *ad litem*.

It is respectfully submitted that this right extended to the widow to enforce her claim by a guardian *ad litem* was reasonably sufficient and adequate and that the application of Section 13 of the New York Civil Practice Act by the court below was in all respects valid.

CONCLUSION

The decisions of the District Court and the Court of Appeals were clearly correct and the petition for certiorari should be denied.

Respectfully submitted,

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